No. 84-1580

In The

Supreme Court of the United States

October Term, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH INADI,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Confrontation Clause requires that the government make a good faith effort to produce a co-conspirator whose out-of-court declarations it seeks to use against the defendant at trial.

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STATEMENT OF THE CASE

Respondent was convicted by a jury of one count of conspiring to manufacture and distribute methamphetamine, and of four counts of related offenses. His conviction was reversed by the Court of Appeals for the Third Circuit because the government had failed to produce at trial or demonstrate the unavailability of an alleged co-conspirator whose declarations were introduced at trial.

As the Court of Appeals noted (Pet. App. 4a), five tape-recorded telephone conversations were the "linchpins of the government's case". Three of these conversations were between respondent and one John Lazaro, an unindicted co-conspirator. Portions of each of the conversations were conducted in code language, as the government concedes (Pet. 4a), and the government asked two witnesses at the trial to translate those conversations for the jury. (2 Trs. 104-5; 4 Trs. 444.) Mr. Lazaro did not testify at trial. The fourth conversation played to the jury involved Marianne Lazaro (John Lazaro's wife) and Michael McKeon, both unindicted co-conspirators who testified at trial pursuant to grants of immunity. The fifth tape recording was of a conversation between John Lazaro and William Levan, an unindicted co-conspirator. Mr. Levan did not testify at trial, having appeared out of the presence of the jury and invoked his privilege against self-incrimination. The jury returned its verdict shortly after listening to the Levan-Lazaro tape a second time.[1]

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[1] After several hours of deliberation, the jury requested and obtained permission to listen again to the Levan-Lazaro conversation. (6 Trs. 665.) The jury did not have the tapes with them during their deliberations, and requested access only to this one.

Respondent objected at trial that Lazaro's recorded statements were inadmissible under the Confrontation Clause because the government had neither produced Lazaro for trial nor demonstrated his unavailability. The government took the position that it did not have to show Lazaro's unavailability. (3 Trs. 288.) The government's attorney represented to the district court that Lazaro had advised her that he would refuse to testify if called, despite her warnings that if he did so he faced penalties for contempt. (13 Trs. 292.)

The district court conditionally admitted the Lazaro conversations in reliance on the prosecutor's representation that she would produce Lazaro and that he would refuse to testify. (3 Trs. 292-3.) The government made no claim at trial that Lazaro had any legitimate Fifth Amendment privilege upon which to base a refusal to testify. That contention was raised first in its brief to the Court of Appeals. In the trial court the government took the contrary position, suggesting that Lazaro had no such claim of privilege (4 Trs. 408), and explaining his absence as "apparently" due to "car problems" (*Id.*). The trial court then expressly agreed to hear Lazaro out of the presence of the jury upon his arrival (*Id.*). The government, however, did not at any time call Lazaro to testify, either before the jury or out of its presence. The order which finally admitted the Lazaro conversations contained no response to respondent's continuing objection to the failure to produce him for cross-examination. (5 Trs. 574-5.)

On this record, the Court of Appeals ruled that admission of the Lazaro conversations was error, despite

their qualification as co-conspirator declarations under Fed.R.Evid. 801(d) (2) (E), because the government had failed either to produce Lazaro for cross-examination or to make the "*minimal* showing of unavailability that will satisfy the Confrontation Clause" (Pet. App. 14a-15a) (emphasis in original). It relied for its holding on this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), in which the Court ruled that, "in conformance with the Framers' preference for face-to-face accusation", normally "the prosecutor must either produce, or demonstrate the unavailability of, the declarant whose statement it wished to use against the defendant." 448 U.S. at 65. (Pet. App. 12a.) The Court of Appeals also noted that the government argued that it was not required to demonstrate the unavailability of a nontestifying co-conspirator declarant, but had "not suggest[ed] any reason why we should create an exception to the clear constitutional rule laid down in *Roberts*." (Pet. App. 12a; footnote omitted.)

The court ruled that there were no policy reasons for excepting co-conspirator declarations from the *Roberts* rule. It held that the Confrontation Clause required the government to make a good faith effort to produce the declarant "before availing itself of [the] tremendous evidentiary advantage" of seeking and obtaining convictions on the basis of testimony not subject to cross-examination. (Pet. App. 13a.)

The court then set forth three alternative ways in which the government might make the requisite minimal showing (none of which was pursued by the government at the trial of this case): demonstration of a good faith effort on the part of the government to secure the wit-

ness' attendance at trial; production of the witness to invoke a claim of privilege; or production of a record, such as an affidavit from the declarant, which establishes both that he will claim the privilege and that requiring his actual appearance would be a meaningless formality. (Pet. App. 15a 16a, 18a.)

The government petitioned for rehearing, challenging the holding of the court and urging in the alternative, for the first time, that the proper remedy was a remand for a hearing on Lazaro's unavailability rather than a new trial. The petition for rehearing was denied.

SUMMARY OF ARGUMENT

I.

The Confrontation Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." It is designed to protect an accused individual from conviction on the basis of out-of-court statements, without benefit of cross-examination.

In this case, the government used out-of-court declarations, admissible in evidence under Fed.R.Evid. 801 (d)(2)(E), to obtain a conviction. The issue here is whether the Confrontation Clause affords protection to a defendant against whom such declarations are introduced. The narrow question is whether the government was obliged by the Constitution to either produce the declarant for cross-examination or demonstrate his unavailability before making use of his declarations.

A. Many commentators trace the origin of the right to confrontation to the trial of Sir Walter Raleigh. Raleigh was tried and convicted on the basis of the deposition of one Cobham, who was never called as a witness. It was apparently in response to Raleigh's conviction the right of confrontation developed in English law. 1 J. Stephen, *A History of the Criminal Law of England* 333-336 (1883). At the trial below, John Lazaro, through the tape recordings introduced into evidence, was a critical witness against respondent, just as the deponent Cobham, through the depositions introduced at trial, was a witness against Sir Walter Raleigh.

The earliest history of the right of confrontation, discussed at length by the government, does not lead to the conclusion it seeks—that hearsay exceptions, including the exemption for co-conspirator declarations, should be viewed as immune from Confrontation Clause scrutiny. While the earliest history of the Clause does not provide the answer to today's question, it provides useful guidance: it is clear from that history that the right of confrontation, which was seen as a protection of the right of cross-examination as well, was considered one of the fundamental aspects of a fair trial.

B. The scope and meaning of the confrontation right is apparent from the decisions of this Court. The Court has developed a rule of necessity in cases construing the Confrontation Clause:

> "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment es-

tablishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarent whose statement it wishes to use against the defendant. See *Mancusi v. Stubbs,* 408 U.S. 204 (1972); *Barber v. Page,* 390 U.S. 719 (1968). See also *Motes v. United States,* 178 U.S. 458 (1900); *California v. Green,* 399 U.S. at 161-162, 165, 167, n. 16."

Ohio v. Roberts, 448 U.S. 56, 65 (1980).

Additionally, the Court said, an inquiry into the reliability of the offered statement is required "once a witness is shown to be unavailable." (*Id.*) With regard to statements falling within a traditional hearsay exception, the Court noted that reliability can often be inferred without more. (*Id.* at 66.)

The rule of necessity is not new. On the contrary, in *Ohio v. Roberts* the Court described the two-step approach that the Court has adopted in its past Confrontation Clause cases as reflecting "the Framers' preference for face-to-face accusation". Although the government argues that the *Roberts* statement of the rule of unavailability is limited to former testimony cases, the Court there indicated just the opposite by stating that the rule applies generally, "including [in] cases where prior examination has occurred." 448 U.S. at 65.

By its terms, the Court's rule of unavailability applies to all out-of-court declarations, whether or not they fall within traditional hearsay exceptions. However, the Court there noted that in certain cases, where the utility of cross-examination is sufficiently remote, the government's failure to produce a witness or show his unavailability may be harmless error.

C. The specific statements at issue here were admitted under the exemption to the hearsay bar for co-conspirator statements. This exemption rests on the fiction that each co-conspirator is an agent of every other co-conspirator. In our adversarial system of justice, admissions are admissible against a party, though they may be hearsay. By extension, admissions of agents or servants are admissible against the principal or master, and by further extension, co-conspirator statements are admissible against an accused other co-conspirator.

Admissibility of these statements, unlike those admitted under Rule 803 and similar state-law exceptions, is entirely unrelated to the likely reliability of the statements. Statements admissible under Rule 801 (d)(2)(E) are often without any hint of reliability. Such declarations will meet the rule's requirements despite the fact that they contain falsehoods: "Many statements actually in furtherance of an alleged conspiracy will be quite unreliable in whole or in part." Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harv. L. Rev. 1378, 1387 (1972).

D. The fact that most of the Confrontation Clause cases examined by this Court involved prior recorded testimony certainly does not lead to a conclusion that a

different result is warranted in cases involving co-conspirator declarations. Former testimony, although given under oath, in the presence of the defendant, and in fact subjected to cross-examination, is not admissible unless the government demonstrates that its admission is necessary because the declarant is unavailable. There is no justification for the government's assertion that co-conspirator declarations—declarations not made under oath, often not made in the presence of the defendant, never made subject to cross-examination, are not governed by the same clear rule.[2] The requirement of production or demonstration of the unavailability of the declarant applies to co-conspirator declarations with at least the force it has in application to cases involving prior testimony, which is more reliable than co-conspirator statements.

There is not a solitary statement identified by the government to support its remarkable contention that the Confrontation Clause decisions of this Court may be reduced to a rule applicable only to former testimony cases. So far as we are aware neither this Court nor any other court nor any commentator has ever read them in the way the government proposes.

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[2] We do not contend that the co-conspirator declarations are not admissible once the declarant is either called by the government as a witness or shown to be unavailable. In either case, the statements are admissible.

II.

The government urges the proposition that, even if this Court agrees that a good faith effort to produce a co-conspirator is a necessary predicate to the use of his out-of-court declarations, the court of appeals "erred in ordering a new trial without giving the government an opportunity on remand to prove unavailability." (Govt. Br. 44.) On this record, it is clear that there are two reasons for determining that the court of appeals did not err: the government *had and declined* its opportunity in the trial court to prove unavailability or produce the declarant; and a hearing more than two years after the trial would be useless for determination of availability *vel non* at trial.

ARGUMENT

I. THE CONFRONTATION CLAUSE REQUIRES THAT THE GOVERNMENT MAKE A GOOD FAITH EFFORT TO PRODUCE A CO-CONSPIRATOR WHOSE DECLARATIONS IT SEEKS TO USE AT TRIAL

A. The Government's Historical Analysis Is Unfounded And Provides No Basis For Its Effort To Place Co-conspirator Declarations Wholly Beyond The Reach Of The Confrontation Clause

The government opens its argument in this case with a lengthy historical review designed to show that when the Confrontation Clause was adopted it was understood that it had no role to play in cases involving "the admission of out-of-court statements falling within exceptions

to the hearsay rule." But none of the historical sources relied upon by the government says as much. Hale and Blackstone did not discuss co-conspirator hearsay, and for purposes of disposition of this case it seems to us inconclusive, to say the least, to assert that they discused the right of confrontation and the hearsay rules on different pages of their treatises, without addressing whether and under what circumstances an available hearsay declarant should be called to testify. And the early recognition that dying declarations could come in without affront to state confrontation clauses is inconclusive as well, since so far as appears the decisions cited by the government all involved declarations of witnesses who were dead and hence unavailable. Those decisions, then, do not establish a historical acceptance of all hearsay exceptions regardless of the availability of the witness.

The government seeks to explain the absence of any square support for its view—that statements admissible as exceptions to the hearsay rule are immune from Confrontation Clause scrutiny—in the writings of "the jurists and scholars of the 18th and early 19th centuries" (Govt. Br. 23) by arguing that the issue was too obvious to warrant comment. According to the government, it was clear that the Confrontation Clause was meant to bar evidence in the form of affidavits or depositions obtained by the prosecution *ex parte*, but to allow evidence falling within traditional exceptions, because the latter carry with them certain independent indicia of reliability that could not be said to characterize affidavits and depositions. But whatever force that argument may have with respect to hearsay exceptions that have arisen on the basis of judgments about the trustworthiness of the out-of-court state-

ments, the government ignores the fact that it has no bearing on the co-conspirator hearsay exemption whose history, as we show later, demonstrates that it is rooted in considerations other than reliability or trustworthiness.

In short, we believe that the government's historical exegesis is simply wrong in suggesting that the issue in this case was resolved in its favor in 1787, and that the course of history has run sure-footedly ever since toward a reversal here on the "sudden epiphany" (Govt. Br. 8) of the court below. Justice Harlan, concurring in *California v. Green*, 399 U.S. 149, 173-4 (1970), noted that "the Confrontation Clause comes to us on faded parchment," and that "[h]istory seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."[3] And in *Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (1980), the Court noted that "[t]he complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary" vouching for widely different, even contradictory approaches and having in common only a declared fidelity to historical accuracy.

The government's review gives short shrift to the discussion of the historical function of the right of confrontation which does emerge from the old sources. While Hale's characterization of confrontation as affording "great opportunities . . . for the true and clear discovery of the truth" is quoted (Govt. Br. 15-16), the government

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[3] See also *Dutton v. Evans*, 440 U.S. 74, 95 (1970) (Harlan, J., concurring) ("It is common ground that the historical understanding of the clause furnishes no solid guide to adjudication.").

fails to take into account the method by which confrontation of witnesses leads to determination of the truth. In an earlier edition, after the section quoted by the government in its brief, Hale explains the method:

> "The very quality, carriage, age, condition, education, and place of commorance of witnesses, is by this means plainly and evidently set forth to the court and the jury, whereby the judge and jurors may have full information of them, and the jurors as they see cause may give the more or less credit to their testimony, for the jurors are not only judges of the fact, but many times of the truth of evidence; and if there be just cause to disbelieve what a witness swears, they are not bound to give their verdict according to the evidence or testimony of that witness. . . ."
>
> M. Hale, *The History of the Common Law of England*, 255-56 (2d ed. 1716).

The government's characterization of Blackstone's *Commentaries* as containing no reference to confrontation rights in its discussion of hearsay is incorrect, perhaps because of a misreading of the language cited in its brief at page 16 (the emphasized portion was omitted from the government's quote):

> "[N]o evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs or matters of common tradition or repute) the courts admit of hearsay evidence, *or an account of what persons deceased have declared in their lifetime: but such evidence will not be received for any particular facts.*"
>
> 3 W. Blackstone, *Commentaries on the Law of England*, 368 (1768) (emphasis added).

That statement of the rule against receipt of hearsay for the truth of the matter asserted follows immediately an analysis of the requirement of live testimony:

> "[T]he one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed."
>
> *Id.*

That general rule, when applied in the specific context of a criminal case, implicates the confrontation rights discussed at pages 373-374 of the *Commentaries* and quoted in the government's brief at pages 16-17. In a criminal context, this Court has long recognized that the confrontation clause protects the "general rule" which Blackstone describes as requiring the "best evidence". Thus, a criminal defendant is guaranteed the opportunity "of compelling [the witness] to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States, supra,* at 242-243.

The relevant history offers no support for the government's notion that "traditional hearsay exceptions . . . should be regarded as presumptively valid" (Govt. Br. 24).[4] Indeed, it is clear that acceptance of the government's notion of "presumptive validity", if it is meant to preclude Confrontation Clause analysis of any hearsay exception established in the law of evidence, would achieve

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[4] Nor does history support the extension of such a notion, even if the Court were to accept its application to hearsay exceptions, to co-conspirator declarations.

what the government is at pains to deplore, namely the constitutionalization of those very exceptions by annointing them all as untouchable under the Confrontation Clause. Moreover, the "presumptive validity" concept, if it is meant to be an *in limine* yet dispositive answer to cases such as this one, is contrary to the case-by-case approach that this Court has followed over the years and has ruled is the correct approach. *Ohio v. Roberts,* 448 U.S. 56 (1980).

This case arises in the context of the role of confrontation to insure the "true and clear discovery of the truth". Hale, at 255. The history that is relevant to its disposition, and to which we now turn, is to be found in the development of the co-conspirator declaration's exemption from the bar against hearsay and in this Court's Confrontation Clause decisions.

B. Admission Of Co-conspirator Declarations Is Not Based On A Theory Of Reliability Which Might Justify Their Removal From Confrontation Clause Scrutiny

This Court's adoption of the rule providing for admission of co-conspirator statements is most often traced to *United States v. Gooding,* 25 U.S. (12 Wheat) 459 (1827). In that case, which concerned the use of statements made by the captain of a ship in the ship-owner's trial, the issue before the Court was admission of statements of an agent against the principal. The Court noted that its rule was also applicable to conspiracy where "once the conspiracy or combination is established the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other in furtherance of the common object." *Id.,* 469. As is apparent, the rationale for admission of evidence concerning co-conspirators is that of agency. Subsequent cases, including those cited by the government at 34-35 of its brief, elaborated on the discussion in *Gooding* and applied it specifically to declarations of co-conspirators as well as to their acts. *See, e.g., American Fur Co. v. United States,* 27 U.S. (2 Pet.) 358 (1829) ("where two or more persons are associated together for the same illegal purpose, any act or *declaration* of one of the parties, in reference to the common object, . . . may be given in evidence against the others". *Id.* 365) (emphasis added); *Lincoln v. Claflin,* 74 U.S. (7 Wall.) 132 (1868) ("The *declarations* of each defendant, relating to the transaction under consideration, were evidence against the other, . . . if the two were engaged at the time in the furtherance of a common design." *Id.* 139) (emphasis added). The reasoning in each instance proceeds from the notion that each co-conspirator is the agent of every other co-conspirator.

The exemption for co-conspirator statements recognized by the Court in *Gooding* and *American Fur Co.* was included in the Federal Rules of Evidence in Rule 801(d) (2) (E), which provides in relevant portion that:

> A statement is not hearsay if—
>
> . . .
>
> (2) . . . The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The rule imposes three separate conditions on admissibility of a statement: that it be made by a co-conspira-

tor; that it be made during the course of the conspiracy and that it be made in furtherance of the conspiracy. The rule does not impose a requirement that the statement be reliable or trustworthy.

Structurally, the rule is embedded in the general exemption for admissions of a party opponent, Fed.R.Evid. 801(d) (2). It follows the specific exemptions for statements adopted by the party, Fed.R.Evid. 801(d) (2) (B), statements made pursuant to authorization provided by a party, Fed.R.Evid. 801(d) (2) (C), and statements made by an agent or a servant concerning a matter within the scope of his duties made during the course of his employment, Fed.R.Evid. 801(d) (2) (D).

The history of the co-conspirator exemption, its formulation, and its placement demonstrate that admissibility of co-conspirator statements is not based on their inherent reliability or trustworthiness. Indeed, "[n]o guarantee of trustworthiness is required in the case of admissions." Advisory Committee Note to Fed.R.Evid. 801(d) (2).

Commentators and courts have recognized that statements admissible under Rule 801(d) (2) (E) are often without any hint of reliability. Statements will meet the rule's requirements despite the fact that they contain falsehoods:

> "A statement may actually further a conspiracy simply by being plausible to its audience, which means that it may well fit within the circumstances *without being true*, and such a statement may appear to satisfy very well both the furtherance and the independent evidence requirements."

Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 Hofstra L. Rev. 323, 357 (1984)

(emphasis added). *See also* Davenport, *supra*, at 1387 ("Many statements actually in furtherance of an alleged conspiracy will be quite unreliable in whole or in part.").

Circuit courts have recognized that statements wholly unreliable from the point of view of the truth of the representations therein are admissible as co-conspirator declarations. For instance, "[p]uffing, boasts, and other conversation" are deemed to be in furtherance of a conspiracy when they are used "to obtain the confidence of one involved in the conspiracy". *United States v. Miller*, 664 F.2d 94, 98 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 121 (1982). And inaccurate recitations of past fact are admissible when they are "[s]tatements between conspirators which provide reassurance [and] serve to maintain trust and cohesiveness among them." *United States v. Ammar*, 714 F. 2d 238, 252 (3rd Cir.), *cert. denied*, 464 U.S. 936 (1983).

Statements admissible under Fed.R.Evid. 801(d) (2) (E) may include deliberately deceptive statements between co-conspirators. There is no analytical reason to assume that such statements would be truthful or accurate or that they are within that class of statements for which reliability may be inferred.

The government's brief fails to take note of the differences—in terms of bases for inferring reliability—between Rule 801(d) (2) (E) and Rule 803.[5] Co-conspirator

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[5] Rule 804's exceptions are premised on the unavailability of the declarant. While the Confrontation Clause may still impose significant constraints in these circumstances, see *Pointer v. Texas*, 380 U.S. 400 (1965) (requiring an adequate opportunity for prior cross-examination for admission of former testimony even where there is no dispute about the witness' unavailability), the constitutional requirement of unavailability is invariably met.

statements and hearsay exceptions are classified separately in the federal rules. This separation reflects the significant theoretical distinction between co-conspirator statements and other hearsay exceptions.

C. The Court's Confrontation Clause Decisions Establish A Rule Of Unavailability For The Government's Use Of Out-Of-Court Declarations

The Confrontation Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." It is designed to protect a person accused of crime from conviction on the basis of out-of-court testimony without benefit of cross-examination.

The government argues that the Court's decisions under the Confrontation Clause fall into three neat categories: it says that the Court subjects to "close regulation" the admission of hearsay which is "broadly analogous to an affidavit or deposition"; that other hearsay exceptions are not subject to "the same close regulation"; and "the Court has held out the possibility of closer examination of any new and radical departures from traditional hearsay rules." (Govt. Br. 25.)

We are not sure what it means to decide Confrontation Clause cases according to norms of "close regulation", not-so-close regulation, or possibilities of "closer examination". And, so far as we are aware, no decision of this Court, or of any lower court, and no commentator has adopted or even perceived the tripartite approach urged by the government. Moreover, the case cited for the proposition that "new and radical departures" fall into the third defined camp of cases, where the Court is said to have "left open the possibility" of application of "stricter standards" (Govt. Br. 31), involved the admission of evidence "under a long-established and well-recognized rule of state law" (400 U.S. at 83) that was "hardly unique" and "was recognized in *Krulewitch* [*v. United*

States, 336 U.S. 400 (1949)]". *Dutton v. Evans,* 400 U.S. 74, 83 & n. 15 (1970).

Our view is that the best indication of this Court's approach to Confrontation Clause cases is to be found in the Court's own description, given in *Ohio v. Roberts.* That case involved the admissibility at the defendant's trial of the transcript of testimony given at a preliminary hearing by a witness called and questioned by defense counsel. After a careful review of its earlier decisions under the Confrontation Clause, the Court noted that "a general approach is discernible" (448 U.S. at 65), which it then set forth:

> "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose satement it wishes to use against the defendant. See *Mancusi v. Stubbs,* 408 U.S. 204 (1972); *Barber v. Page,* 390 U.S. 719 (1968). *See also Motes v. United States,* 178 U.S. 458 (1900); *California v. Green,* 399 U.S. at 161-162, 165, 167, n. 16."
>
> *Id.* (Footnote omitted but discussed below at note 6).

And second, said the Court, an inquiry into the reliability of the offered statement is required "once a witness is shown to be unavailable." (*Id.*) With regard to statements falling within a traditional hearsay exception, the Court noted that reliability can often be inferred without more. (*Id.* at 66.)

By its terms, the *Roberts* rule of unavailability applies to all out-of-court declarations, whether or not they fall within traditional hearsay exceptions. The Court there noted, however, that the threshold requirement of production of the declarant or demonstration of unavailability need not always be met.[6] (The second inquiry, into reliability of the out-of-court declaration, will often be satisfied by a showing that the declaration is within a traditional exception to the rule against hearsay.[7])

This Court's recognition of an established "rule of necessity" requiring the prosecutor "to demonstrate the unavailability of" an unproduced declarant, far from being an "off-hand" embrace of "a revolutionary proposition" (Govt. Br. 27), was one which was supported by the decisions relied on by this Court and one which the Court returned to and repeated, saying, "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." (*Id.* 66.)

[6] The *Roberts* Court observed in a footnote that in *Dutton v. Evans*, 400 U.S. 74 (1970), "the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness." 448 U.S. at 65 n. 7. The result in *Dutton* reflected no judgment by the Court that co-conspirator hearsay by its nature was immune from the availability requirement, but rather a practical, essentially harmless error analysis based on the fact that the hearsay in that case came in through brief testimony, "of peripheral significance at most", of one of twenty witnesses who testified for the prosecution. 400 U.S. at 74. The *Dutton* exception has no relevance to this case, where, as the court below noted, the recorded conversations constituted "[t]he linchpins of the government's case" (Pet. App. 4a) and the government accordingly made no argument to the Court below that the testimony of Lazaro was of peripheral significance or that cross-examination of him would have had no utility.

[7] The Court has declined in the past to decide—and need not decide in today's case—on whether the inferred reliability of statements within certain "firmly rooted" exceptions to the hearsay rule may warrant relaxation of or dispensing with the rule of unavailability. *See, e.g., Ohio v. Roberts*, 448 U.S. at 66 & n. 8 (1980); *California v. Green*, 399 U.S. 149, 155 (1970). *Bruton v. United States*, 391 U.S. 123, 128-9 & n. 3 (1968).

As the Court noted, the rule of necessity finds explicit support as far back as 1900. In *Motes v. United States*, 178 U.S. 458 (1900), a co-conspirator confessed and implicated the defendants at a preliminary hearing where he was cross-examined by defense counsel. The co-conspirator thereafter escaped before trial, and at trial his confession, reduced to writing, was introduced, as was testimony about the confession from several officials who had attended the preliminary hearing. The Court held that the statements were admitted "in violation of the constitutional right of the defendants to be confronted with the witnesses against them," notwithstanding their prior opportunity for cross-examination, because the unavailability of the witness at trial "was manifestly due to the negligence of the officers of the Government." (*Id.* 471; *see also id.* 474.)

The unavailability rule was foreshadowed in decisions of this Court even earlier than *Motes*. In *Mattox v. United States*, 156 U.S. 237 (1895), during a homicide prosecution the government introduced the testimony of two witnesses who had testified at a former trial and who had since died. At the former trial they had been cross-examined. The Court reviewed the authorities and concluded that "the right of cross examination having once been exercised, it was no hardship on the defendant to allow the testimony of the deceased witness to be read."

The Court also, in dictum, vouched for the admissibility of dying declarations under the Confrontation Clause. Even in that circumstance, it was clear that the unavailability of the witnesses was assumed to be a predicate for the admission of the declaration. Thus the Court said, presaging *Ohio v. Roberts*, that "*the necessities of the case*" justified the admission of such declarations "because made by a person then dead." *Mattox v. United States*, 156 U.S. at 244 (emphasis added.)

Pointer v. Texas, 380 U.S. 400 (1965) makes clear that the right secured by the Confrontation Clause is not simply the right to face one's accuser in court. The victim of a robbery, Phillips, testified at Pointer's preliminary hearing. Pointer was present, but was not represented by counsel and did not cross-examine Phillips. Phillips did not appear at the trial and his preliminary hearing testimony was introduced against Pointer. The Court reversed Pointer's conviction, holding that his rights under the Confrontation Clause had been violated. The Court stated:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, e.g., 5 Wigmore, Evidence, Section 1367 (3d ed. 1940)."

Id. 404. Later, the Court continued:

> "Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."

Id. 406-07 (citations omitted). Thus, the Court recognized that the Confrontation Clause embodies the right to cross-examine witnesses.

The Court's Confrontation Clause analyses in decisions after *Mattox* and *Motes* demonstrate the continuity between those early decisions and the *Ohio v. Roberts* rule of necessity. For instance, in *California v. Green*, 399 U.S. 149 (1970), the Court faced a Confrontation Clause challenge to the substantive use at trial of prior inconsistent testimony of a witness who appeared at trial and whose earlier testimony had been subject to cross-examination. The former testimony was admitted pursuant to a state rule of evidence, but this Court explained that admissibility under rules of evidence did not establish constitutionality under the Confrontation Clause (*id.* 155):

> "Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber v. Page*, 390 U.S. 719 (1969); *Pointer v. Texas*, 380 U.S. 400 (1965)."

The Court upheld the admission of the former testimony, since the declarant had actually appeared at trial. It said that its previous Confrontation Clause cases do not "require excluding the out-of-court statements of a witness who is available and testifies," but instead mostly dealt with the opposite situation, in which the declarant was unavailable "despite good-faith efforts of the State." *Id.* 161.

The Court also held that the witness' statements in that case were admissible because they had been subject to cross-examination at the earlier hearing, but in so doing squarely recognized the unavailability rule: "[The witness] Porter's statement would, we think, have been admissible at trial even if Porter had been actually unavailable, despite good-faith efforts of the State to produce him." (*Id.* 165.) And again: "If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony at the preliminary hearing" because the right of cross examination afforded at that hearing provided "substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State." *Id.* 166.[8]

Similarly, in *Barber v. Page,* 390 U.S. 719 (1969), where the state introduced out-of-court statements of a declarant who was jailed in a nearby state, the rule of unavailability was assumed and the question was whether the declarant's incarceration satisfied it. The Court held not: "In short, a witness is not 'unavaliable' for the purposes of the foregoing exception to the confrontation re-

[8] Indeed, the Court's understanding that good faith efforts by the government to produce the declarant are a precondition to the admission of the declarant's out-of-court statements permeates the entire decision. In addition to the examples already noted, see *id.* 167 ("The State here has made every effort"); 167 n. 16 ("necessity" exists when a witness is unavailable because of the State's 'need' to introduce relevant evidence that through no fault of its own cannot be introduced in any other way"); and *id.* ("As long as the State has made a good faith effort to produce the witness, the actual presence or absence of the witness cannot be constitutionally relevant for purposes of the 'unavailability' exception.")

quirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." *Id.* 724-725. The Court also ruled that, even if the statements that were introduced had been subject to cross-examination at the time they were made, they would nonetheless have been inadmissible under the Confrontation Clause "unless the witness is shown to be actually unavailable" at trial. *Id.* 725-726.

Mancusi v. Stubbs, 408 U.S. 204 (1972), is the same. There the initial question was whether the declarant's out-of-court statements were admissible under the Confrontation Clause on the ground that the declarant, who by the time of trial resided in Sweden, was unavailable. Following precisely the two-part analysis later said to be the hallmark of the Court's Confrontation Clause cases in *Ohio v. Roberts,* the Court first determined that the declarant was actually unavailable, the State having been "powerless to compel his attendance" at the trial, *id.* 212, and then turned to the question of reliability: "It is clear . . . from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some . . . 'indicia of reliability' . . . ." *Id.* 213 (citations omitted).

In the face of this longstanding, consistent string of harmonious rulings from this Court establishing a rule of unavailability, there is simply no merit to the government's position that the holding of the court below—which is absolutely faithful to these decisions—marks a sudden, erratic departure from Confrontation Clause jurispru-

dence. The government supports its view in that regard and seeks to deal with all of these decisions, by saying that they "must have been intended to describe only the exception for former testimony." (Govt. Br. 26.)

There is not a solitary statement in any of those decisions (and the government identifies none) to support the remarkable view that the Confrontation Clause decisions of this Court boil down to a rule applicable only to former testimony cases, and so far as we are aware neither this Court nor any other court nor any commentator has ever read them in the way the government proposes.[9] On

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[9] Indeed, one commentator, cited with approval in *Ohio v. Roberts* (albeit for other reasons), has taken the contrary view:

> "The rules formulated above [for assessing reliability] should not be applied to justify a failure by the prosecustor to call an available declarant. Those rules are at best inferior substitutes for cross examination of the actual declarant and should be resorted to only where the declarant is in fact unavailable to testify. As the Supreme Court has indicated several times, the confrontation clause should require the prosecutor to make a good faith effort to produce the literal accuser. Thus: *Rule IV—Co-Conspirator hearsay is not admissible until the prosecution has made an affirmative showing that the declarant is unavailable.*"

Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1403 (1972) (citations omitted, emphasis in original).

the contrary, in *Ohio v. Roberts* the Court described the two-step approach that the Court has adopted in its past Confrontation Clause cases as reflecting "the Framers' preference for face-to-face accusation", and its statement of the rule of unavailability, far from being limited to former testimony cases, indicated just the opposite by stating that the rule applies generally, "including [in] cases where prior examination has occurred." 448 U.S. at 65.

In short, the history of the Confrontation Clause jurisprudence that is relevant to this case, found in an unbroken line of decisions of this Court spanning at least 85 years, sides with us and warrants affirmance of the decision below since the prosecution "[n]either produce[d], [n]or demonstate[d] the unavailability of, the declarant whose statement is . . . use[d] against the defendant." *Ohio v. Roberts*, 448 U.S. at 65.

The fact that most of the Confrontation Clause cases examined by this Court involved prior recorded testimony certainly does not lead to a conclusion that a different result is warranted in cases involving co-conspirator declarations—declarations not made under oath, often not made in the presence of the defendant, never made subject to cross-examination. Surely such declarations, if used against a defendant, must be attended by at least the safe-

guards required for the government's use at trial of former testimony.

D. The Rationale And Purpose Of This Court's Rule Of Unavailability Apply To Co-conspirator Declaration Cases

Initially, we highlight the fundamentally simple rules emerging from this Court's holdings which are omitted from the government's analysis: the Court's rule of necessity applies to all out-of-court declarations; where the utility of cross examination is sufficiently remote, the government's failure to produce a declarant or to demonstrate his unavailability may be harmless error; when the out-of-court declaration falls within a traditional hearsay exception, reliability may be inferred.

The Confrontation Clause and the hearsay bar are not congruent, but do spring from the same roots. Their common source is a concern for the reliability of the evidence put before a fact-finder. The exceptions to the hearsay rule reflect a concern for rules which do not unduly hinder the fact-finder's access to reliable evidence.[10] Their roots are different from the source of the rule which permits receipt of co-conspirator declarations.

The exemption for co-conspirator declarations does not arise from judgments about trustworthiness of certain sorts of out-of-court declarations. It is justified by the adversary system and by the "fiction" that a co-conspirator speaks for all members of the conspiracy as an agent

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[10] It is this concern which explains this Court's willingness to infer reliability in most traditional exceptions to the hearsay rule.

speaks for a principal. That fiction is grounded in a notion quite distinct from truthfuiness or reliability of evidence.

We consider next what follows from application of these rules to this case. Clearly, the Confrontation Clause originally developed as a protection against trial by affidavit or deposition:

> [T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of ex parte affidavits or depositions . . . thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. . . . The proof was usually given by reading depositions, confessions of accomplices, letters and the like. . . .

California v. Green, 399 U.S. at 156-57 (quoting 1 J. Stephen, *A History of the Criminal Law of England* 326 (1883)).

The protection extends to the government's use of former testimony. The defendant may not be deprived of the right to confront and cross-examine the witnesses against him unless resort to that testimony is *necessary*. Use of former testimony denies a defendant the opportunity

> "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Mattox, 156 U.S. at 242-43.

This is so, as a matter of constitutional law, even though in the case of former testimony a defendant may

have had the opportunity to physically confront the witness in court and the witness testified under oath and was subjected to cross-examination. These features of prior confrontation distinguish former testimony from affidavits or depositions.[11] They insure some protection to the rights secured by the Confrontation Clause, but do not excuse the government from its obligation to produce the witness or demonstrate his unavailability.

By contrast with former testimony, co-conspirator statements are not made in court under oath and subject to cross-examination. While they may be made in the presence of the defendant, they need not be. The use of such statements at trial without confrontation imperils precisely the same values as does the use of former testimony, but offers far less protection. There is no comprehensible reason why, in such a case, the government should be excused from its burden of producing an available witness.[12] If, as is clearly the case, previously recorded testi-

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[11] Former testimony is preferable to affidavits and depositions in this regard since at least a defendant may have once had an opportunity to confront and cross-examine the witness against him. In recognition of this, former testimony may be admissible, despite the denial of trial confrontation, where the witness is shown to be unavailable. By contrast, depositions and affidavits cannot be used in a criminal trial, even though the witness may be unavailable. See *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965).

[12] Adoption of the government's position could lead to anomalous results. If, at a first trial, a co-conspirator were called to testify and did testify, and if a new trial were ordered, at the second trial, absent a showing of unavailability, the government could not use the prior testimony, despite the fact that the defendant may have vigorously cross-examined the witness. The government could, however, use out-of-court statements, unsworn and not subject to cross-examination.

mony may not be introduced unless the declarant is unavailable, it seems to us *a fortiori* that the same rule must apply to co-conspirator statements.

As we see it, the government offers three reasons in support of its view that the unavailability requirement should not apply in co-conspirator declaration cases: (1) co-conspirator declarations are meaningfully different from prior recorded testimony in that the latter is an inferior substitute for live testimony, whereas co-conspirator declarations carry their own saving independent probative value; (2) if an exception is not announced in this case, the Court will necessarily have to decide the same issue with respect to all the exceptions to the hearsay rule set forth at Rule 803; and (3) an affirmance here would have a calamitous effect on the government's ability to prosecute conspiracy cases.

The government's first reason for arguing that the rule of necessity should not apply in co-conspirator cases —that the *Roberts* rule is designed for only former testimony situations—is fundamentally in error and rests on an incorrect and narrow view of the purposes of the Confrontation Clause. Cases involving the admission of prior recorded testimony, the government repeatedly says, properly require application of the rule of unavailability because prior recorded testimony is like affidavits or depositions.

Though never explicitly stating the ways in which former testimony is comparable to affidavits or depositions, the government refers to several "critical respects" which it claims are relevant. (Govt. Br. 25.) These critical respects apparently are that affidavits and depositions can be detailed and comprehensive, can be crafted to make out all elements of the charge against the defendant, are created with litigation in mind and are therefore subject to distortion, and are created in the presence of and under the potential influence of one of the parties. (Govt. Br. 24.)

It may be true that affidavits, depositions and former testimony are similar in those respects. However, the government omits the most crucial features of confrontation from its list of "critical respects." It was the absence of these features from depositions and affidavits that was most objectionable to the early creators of the right to confront witnesses.

The government characterizes "evidence falling within other traditional hearsay exceptions," as having "probative value very different from subsequent live testimony" and says that such evidence does not require as a predicate for its admissibility a showing of the unavailability of the declarant. That evidence is distinguished from former

testimony, which it describes as a "next-best substitute."[13] (*Id.* at 9. See also *id.* at 23, 27.) It is correct that some out-of-court statements may have independent probative value. Thus, a jurisdiction may, as an evidentiary matter, choose to admit them into evidence for their own merit, even where the declarant is available. Yet this neither logically compels nor justifies their exclusion from the realm of evidence subject to the Confrontation Clause.

The government's position—assenting to an unavailability requirement for prior testimony but not for cases involving hearsay historically judged to be reliable (Govt. Br. 28)—is inappropriately taken in this case. Assuming *arguendo* that considerations of reliability should bear on the rule of unavailability, that question is not before the Court in this case: whatever the merits of its argument with respect to the exceptions to the hearsay rule codified in Federal Rule of Evidence 803, exceptions which we admit to be based on judgments about reliability, the government's position is wholly without substance in cases, such as this one, involving co-conspirator declarations.

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[13] Former testimony is said to be a "next-best substitute" because ordinarily it adds nothing to the live testimony offered in court and before the jury. If the witness has testified consistently before the jury, admission of the former testimony would add nothing that could aid the jury in its deliberations. It simply restates the live testimony, without allowing the jury the opportunity to assess the witness. If the witness has testified inconsistently, or if the earlier testimony was offered before a motive to fabricate arose, the former testimony may add something to the jury's deliberations, and is often admissible. See Rule 801(d)(1).

For similar reasons, the government is wrong in its second argument, that an affirmance in this case would necessarily mean that 23 of the exceptions recognized in Rule 803 without regard to availability "contravene the Confrontation Clause" (Govt. Br. 27), or anyway would introduce the camel's nose into the tent and require a "[c]lose reexamination of all the traditional hearsay exceptions under the Confrontation Clause." (*Id.* at 10) Those exceptions, the government says, "have been forged with full consideration of the very same fundamental concern that underlies the Confrontation Clause: what kind of evidence is too likely to mislead the finder of fact to permit its use at trial." (*Id.*) But as we have shown, the co-conspirator exception has *not* been forged with those considerations in mind. Thus the government cannot reasonably support its position by pointing out that "[i]n developing the proposed Rules of Evidence . . . the advisory committee carefully considered whether each of the hearsay exceptions possessed sufficient 'guarantee of trustworthiness'" (*Id.* at 34), since the rule they devised to govern the admissibility of co-conspirator statements was acknowledged, as we showed above, to have nothing to do with trustworthiness.

Accordingly, if, as we urge, the Court declines the government's invitation to dispense with the rule of unavailability in co-conspirator declaration cases, recognizing that that particular exemption from the hearsay bar does not carry with it the sort of indicia of reliability recognized for the exceptions listed in Rule 803, there need be no fear than an affirmance in this case will prejudge the constitutionality of any of the Rule 803 exceptions. This case does not involve any of those exceptions. There

will be time enough, in the appropriate case, to consider the government's argument that those exceptions are entitled to presumptions of validity based on their underlying and long-standing "psychological judgments about human behavior outside the courtroom." (*Id.* at 28.)

We come, finally, to the government's third argument, that an exception to the rule of unavailability is required for co-conspirator declarations because that kind of evidence is used "tens of thousands of times each year" (Govt. Br. 10-11); because the rule will burden the government, which in a single case may wish to introduce the out-of-court statements of "literally dozens of conspirators" (*id.* at 37); and because "[i]n many instances the declarant will not be identified by the prosecution" (*id.* at 39).

In our view that proves too much. The co-conspirator hearsay exemption is a formidable prosecutorial advantage—one given quite without regard to the reliability or trustworthiness of such declarations, and indeed in the teeth of the recognition that those declarations are in fact unreliable. That advantage is the very reason why it is used tens of thousands of times each year. And that is the very reason why the core values of the Confrontation Clause require that the declarant be produced if the government can do so with a good faith effort.

This Court has recently reaffirmed the Clause's "fundamental role in protecting the right of cross-examination" and that its "very mission" is to advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee v. Street,* No. 83-2143 (May 13, 1985), slip op. 6,. quoting *Dutton v. Evans,* 400 U.S. at 89. It seems to us

that this truth-seeking goal would not be served by a rule that would allow the government, without any showing of a good faith effort to produce them, to seek and obtain convictions on the basis of out-of-court statements of dozens of individuals. The rule for which we contend—the requirement that the government produce or demonstrate the unavailability of the individuals whose out-of-court declarations are to be used against a defendant—is more in harmony than is the government's proposed rule with the long-recognized truth-protecting mission of the right of confrontation, to insure that

> "the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the wi'ness. . . ."
>
> 3 W. Blackstone, *Commentaries on the Law of England* 374 (1768).

Moreover, the government's parade of burdens is vastly overstated, and in any event is wholly unrelated to the facts of the case now before the Court, where the prosecution used the out-of-court statements of four declarants aside from the defendant, all of whom were well known to the government and located in time for trial. The requirement that the government show a good faith effort to produce the declarant is itself straightforward and simple enough.[14] It may be that the requirement would become onerous as applied to dozens of out-of-court declarants in a single case, but as a practical matter we find

[14] The test of unavailability and on good-faith efforts is not unduly burdensome. *See, e.g., Ohio v. Roberts, supra* (witness was found to be unavailable where she was travelling in the United States and had not called her mother).

it hard to imagine the situation in which hearsay by the dozen would not be cumulative. Thus, the rule of unavailability is more likely simply to prompt the government to be selective in its choice of which declarations to use, rather than to "exact a grave toll on the resources of the criminal justice system." (Govt. Br. 36.)[15]

The government also opposes the unavailability rule on the asserted ground that many declarants, if called, would exercise their privilege not to testify. That, too, is a matter of some speculation. In many cases, the government itself may wish to call the declarants to testify—as it did in this case—and accordingly grant immunity to those declarants, which is likely to occur long before, and thus cause no disruption to, the trial. That is what happened here: The government introduced the out-of-court statements of McKeon and Mrs. Lazaro; and it called them to testify after having made immunity arrangements with them far in advance of trial. Beyond that, the court of appeals noted that in some circumstances the government could show its good faith efforts to produce through the simple procedure of presenting an affidavit from the declarant establishing that he would claim the privilege. (Pet. App. 18a.) And, finally, it bears repeating that these hardship claims by the government that the rule of unavailability will cause "considerable drain on available investigative and prosecutive resources" (Govt. Br. 42) amount to speculations and scary predictions that are not grounded in the facts of this case nor, apparently, in the

[15] And if, as the government suggests, the prosecution seeks to use the hearsay of a declarant who is incarcerated, the means for producing the declarant have long been readily available, as noted in *Barber v. Page, supra*.

government's experience during the last year in the Third Circuit (where the rule has been in effect since the decision below in November 1984) or in any other circuit where the rule has been held to apply and where, apparently, the government's ability to discharge its prosecutorial function has not been harmed.

The government claims additionally that the unavailability rule in co-conspirator declaration cases will not serve the truth-seeking goals of the Confrontation Clause because defense counsel will not wish to cross-examine any declarants that the government does produce or because declarants who do testify "would give evidence favorable to the prosecution." (Govt. Br. 43.) We are not so certain that testifying declarants would necessarily give evidence favorable to the government or that those who did would not be the subject of cross-examination by defendants. In the case here the defendant cross-examined both McKeon and Mrs. Lazaro at length and was prepared to cross-examine Mr. Lazaro had the government called him, as it repeatedly said it would. Certainly there is no reason to allow the government to defeat the unavailability rule on the basis of predictions that defendants would not wish to cross-examine the out-of-court declarants.

Finally, it seems to us worthwhile to put the government's claims of hardship in proper context under the Confrontation Clause. The government has presented hypothetical examples of geographically dispersed conspiracies involving dozens of conspirators acting over a period of years. Let us instead present a more simple example —the murder prosecution of a single defendant. In this example, the government presents only two witnesses at

trial: the coroner who testifies as to the manner of death, and one Allen, an unindicted co-conspirator. Allen testifies that he and the defendant and a third conspirator, Brown, agreed to murder the deceased. That testimony establishes the foundation for admission of Brown's out-of-court statements. Allen then testifies that he himself was elsewhere at the time of the murder but that on the following day Brown (a) reported to him that the objective of the conspiracy was mainly accomplished because he had witnessed the defendant commit the murder and (b) asked for advice on disposing of the murder weapon in order to accomplish the conspiracy's final goal of leaving no evidence. The latter inquiry brings the entire statement within the furtherance of the conspiracy. That is the sum of the government's case.

There can be no doubt in this example that Brown, a purported eyewitness to the murder, and the defendant's accuser, is a "witness against" the defendant within the meaning of the Confrontation Clause, and we would have thought that the core values protected by the Clause would entitle the defendant "to be confronted with" Brown, not simply with Allen's testimony that Brown, murder weapon in hand, said that the crime was the defendant's. And it seems to us inconceivable that the government should be able to defeat the guarantee of the Sixth Amendment in such a case on the ground that making a good faith effort to produce the out-of-court declarant is burdensome. If burdensomeness is to be the test under the Confrontation Clause, then the government could dispense as well with producing the coroner and Allen, substituting in their place affidavits and depositions.

II. THIS COURT SHOULD NOT ORDER A REMAND FOR A HEARING ON THE QUESTION OF THE WITNESS' UNAVAILABILITY

The government urges the proposition that, even if this Court agrees that a good faith effort to produce a co-conspirator is a necessary predicate to the use of his out-of-court declarations, the court of appeals "erred in ordering a new trial without giving the government an opportunity on remand to prove unavailability." (Govt. Br. 44.) On this record, it is clear that there are two reasons for determining that the court of appeals did not err: the government *had and declined* its opportunity in the trial court to prove unavailability or produce the declarant; and a hearing more than two years after the trial would be useless for determination of availability *vel non* at trial.[16]

The government asks here for a second bite at an apple it once rejected. The government was advised at trial that it should produce the witness. The trial judge specifically told the government's attorney that he would hear from the witness once the government put him on the

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[16] An additional reason for declining to grant the government's request for a remand is the fact that the question of remand was not ruled on by the court of appeals. The government never raised the issue until its Petition for Rehearing and Suggestion for Rehearing In Banc. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 233-34 (1976). *See also United States* v. *Lovasco*, 431 U.S. 783, 788-89 (1977); *Usery* v. *Turner Elkhorn Mining Company*, 428 U.S. 1, 37-38 (1976); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). The remedy now sought by the United States is neither simple nor expeditious. Because the issue was not properly raised, the scope and purpose of such a hearing are ill-defined and raise factual issues not addressed by the parties.

stand out of the presence of the jury. (4 Trs. 408.) The judge admonished the government that it should establish unavailability at trial, rather than risk litigating on appeal its failure to do so. (3 Trs. 292.) The government chose to ignore that admonition, and rested its case after representing only that the witness "apparently" had "car trouble." (4 Trs. 408.)

A hearing now would be completely inadequate as a device for resolving the question whether the witness would have testified had the government accepted the trial court's offer to hear from him first out of the jury's presence. There is no allegation that the witness was physically unavailable, a matter which might be susceptible of determination two years after the trial. It is clear that the government was in touch with the witness, since it made repeated representations that he would testify against respondent.[17] Rather, the issue which the government proposes to resolve on remand (in addition to the

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[17] The court below commented on the government's failure to try to secure the witness's presence:

> "Government counsel did not request a bench warrant, nor does it appear that they made any additional effort to compel his attendance at trial. We can safely assume that counsel's conduct would have been considerably more aggressive had counsel felt it was necessary in order to 'win'. Under such circumstances, counsel would have sought a bench warrant and refused to assume that the judicial process is so impotent that a witness's hostility is a basis for making no effort. Counsel's efforts here clearly do not constitute a 'good faith effort' under *Barber*." (Pet. App. 15a.)

witness' "car trouble"), is whether Lazaro would have refused to answer questions on pain of contempt.[18]

Whether or not Lazaro would have gone to contempt at time of trial, or whether or not he will choose to go to contempt at a new trial, cannot be answered outside the context of a trial. As the court below noted, any such determination of the witness likely response to a threat of contempt would be based on speculation: "Every veteran trial judge has experienced the situation where a hostile witness discards his 'stonewalling' tactics when faced with an imminent contempt citation" (Pet. App. 15a).

Even the government does not contend that this record supports a conclusion that the utility of cross-examination of Lazaro, if he had testified, is remote. In this case, where several conversations were partly in code, where it was one of Lazaro's conversations which the jury asked to hear again before returning its verdict against respondent, and where the government does not contest the utility of confrontation, there is no likelihood that the district court would find beyond a reasonable doubt that cross-examination of Lazaro would not have been useful at trial. The

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[18] The Fifth Amendment claim was never made at trial. Indeed, the government suggested there that the witness had no such privilege. (4 Trs. 408.) It was raised for the first time by way of speculation in the government's brief to the court of appeals. Thus, it is not properly before the court now. Even were it properly raised, the court of appeals was correct when it noted that it "would not find an adequate showing of unavailability absent an actual assertion of privilege and exemption by ruling of the court. Unlike defendants, witnesses have no blanket right to stand mute; we cannot say on the basis of this record that John Lazaro would have asserted the fifth amendment privilege." (Pet. App. 16a.)

likely effect of his testimony on cross-examination could not, at a remand hearing, be determined to be so pallid that denial of confrontation could be ruled harmless error.

In this instance the hearing requested by the government would be meaningless. The Court should not order a remand.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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